UNITED STATES OF AMERICA

v.

D.J. Ref. 90-11-3-08502
(Eagle Zinc Site, Hillsboro, IL)

T.L. DIAMOND & CO., INC. and THEODORE L. DIAMOND, INDIVIDUALLY

THE SHERWIN-WILLIAMS COMPANY'S OBJECTIONS TO PROPOSED SETTLEMENT AND CONSENT DECREE

To: Assistant Attorney General
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The government has proposed a consent decree that would provide Defendants T.L. Diamond & Co., Inc. ("TLD") and Theodore Diamond (collectively the "Diamond Defendants") with protection against any contribution claims by other potentially responsible parties ("PRPs") for response costs incurred at the Eagle Zinc Superfund Site ("Site") in exchange for a settlement amount that has no rational relation with the Diamond Defendants' comparative fault at the Site. The government has also offered this windfall to the Diamond Defendants without any analysis of Mr. Diamond's current ability to pay response costs at the Site – the *de minimis* settlement with Mr. Diamond is particularly troubling because of the failure to conduct any inquiry at all into Mr. Diamond's financial wherewithal. Because the settlement agreement with the Diamond Defendants is unfair, unreasonable, and inconsistent with the goals of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601, et seq., The Sherwin-Williams Company ("Sherwin-Williams") files these objections to the proposed settlement and consent decree. These objections are submitted consistent with an extension of time granted by the United States Department of Justice to May 19, 2008.

Statement of Facts

The Site at issue, the Eagle Zinc facility in Hillsboro, Illinois, was being used by Eagle-Picher Industries to process zinc oxide since at least 1923. (HRS Documentation Record ("HRS Doc. Rec.") at 14.) Eagle-Picher operated the facility until November 1980 when it sold the facility to Sherwin-Williams. (*Id.*) During the time it owned the facility, Eagle-Picher operated a muffle furnace, rotary furnaces, a Wetherill furnace, and a carbon recovery system. (Deposition of Luther Moler ("Moler Depo.") at 12-35.) Eagle-Picher stored residues from these processes in piles on the property and reused certain residues particularly high in zinc content. (*Id.*; HRS Doc. Rec. at 14.) Eagle-Picher, however, did not reuse all of its residues and did not dispose of the remainder, instead allowing the residues to accumulate in the piles on the property. (Moler Depo. at 12-35; HRS Doc. Rec. at 14.) Sherwin-Williams bought the property in November 1980 and operated it for one year prior to shutting the plant down; Sherwin-Williams ultimately sold the property to T.L. Diamond in 1984. (*See* HRS Doc. Rec. at 14; Comment of Weston Solutions, Inc., dated May 2, 2007.) During its operation of the facility, Sherwin-Williams attempted to reduce the amount of residue that had accumulated on the property during Eagle-Picher's ownership of the plant. (Moler Depo. at 48-50, 55-56.) Among its efforts to sell off or reduce the amount of residue, Sherwin-Williams removed 18,000 tons of residue materials from the Site under the supervision of the Illinois EPA. (HRS Doc. Rec. at 14.) Although it only operated the facility for less than one year, Sherwin-Williams engaged in cleanup of the property at a substantial cost during the three years it owned the real property. Sherwin-Williams sold a cleaner facility to TLD in 1984 than it had purchased only three years before. The Diamond Defendants operated the Eagle Zinc facility for the next 19 years – from 1984 to 2003, and continue to own it to this day. (HRS Doc. Rec. at 14.)

By 2001 during the Diamond Defendants' operations, EPA had begun an investigation of the Eagle Zinc Site that ultimately resulted in the Site's listing on the National Priorities List in September 2007. As part of that investigation, EPA identified Eagle-Picher, Sherwin-Williams, and TLD as PRPs and required them to conduct a remedial investigation and feasibility study ("RI/FS"). (*See* Administrative Order on Consent dated December 31, 2001.) Commensurate with the Diamond Defendants' status as current owner of the Site and operator of the facility for the last 19 years, TLD was required to pay the majority of the cost of the RI/FS. (*See* Proposed Consent Decree at ¶B.) Following the study, the response costs at the Site have been estimated at up to $7 million by EPA and $11 million by the Illinois EPA.

To settle its claims for response costs, the government engaged in negotiations with the Diamond Defendants concerning settlement of their liability but did not engage in similar negotiations with Sherwin-Williams prior to the filing of the complaint in the Central District of Illinois. The discussions with the Diamond Defendants led to the proposal of a settlement recovering only a fraction of the response costs for the Site while providing the Diamond Defendants broad protection against further liability related to the Site. Under the proposed consent decree, TLD is required to pay only $500,000 and Mr. Diamond $250,000 in settlement of the government's claims. (Proposed Consent Decree at ¶¶6-7.) Notwithstanding their current ownership and 19 years of operation of the Site, as well as the previous recognition that they were the appropriate PRP to bear the majority of the financial obligation for the RI/FS, the proposed combined settlement of $750,000 would pay for less than 11% of EPA's estimated $7 million response costs.

In exchange for that limited payment, the proposed settlement would release the government's claims against the Diamond Defendants for response costs and would bar any

contribution claims by Sherwin-Williams or other PRPs for response costs incurred at the Site under 42 U.S.C. §9613(f)(2). (Proposed Consent Decree at ¶30.) The administrative record indicates no basis for accepting such a small settlement in the face of the Diamond Defendants' substantial liability. The record does not reflect consideration of evidence of the Diamond Defendants' current ability to pay, as the record lacks financial statements from TLD subsequent to October 2005, more that 28 months before the settlement date, and, significantly, contains no financial information for Mr. Diamond, despite his historic transfers of large sums of money out of TLD to enhance his personal fortune. Under these circumstances, the proposed consent decree is improper.

A proposed consent decree may only be entered if it is fair, reasonable, and consistent with the purposes of CERCLA. *See United States v. Cannon Engineering Corp.*, 899 F.2d 79, 85 (1st Cir. 1990). In this case, the proposed settlement does not meet these requirements.

1. Fairness

The fairness requirement has both procedural and substantive components. *Cannon*, 899 F.2d at 86. Procedural fairness depends on the candor, openness, and bargaining balance in the negotiation process. *Id.* In the present case, Sherwin-Williams did not have the same opportunity to engage in settlement negotiations concerning its ultimate liability at the Site. Instead, the government focused its negotiations on the Diamond Defendants, who had a greater proportion of the fault and a much greater stake in the Site.

More significantly, though, the proposed settlement is not a substantively fair allocation of liability for contamination at the Site. Substantive fairness incorporates "concepts of corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible." *Cannon*, 899 F.2d at 87. Accordingly, "settlement terms must be based

upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each PRP has done." *Id.*; *see United States v. AlliedSignal, Inc.*, 62 F.Supp.2d 713 (N.D.N.Y. 1999) (rejecting proposed settlement as lacking rational basis for apportionment of fault). EPA must identify a plausible and coherent explanation for its measurement of comparative fault and allocation of liability, "welding some reasonable linkage between the factors it includes in its formula or scheme and the proportionate shares of the settling PRPs." *Cannon*, 899 F.2d at 87. A settlement is improper where it does not contain an objectively identifiable rational basis. For example, in *AlliedSignal*, the court was compelled to reject a proposed consent decree as substantially unfair where EPA's estimated cost per ton of remediation for purposes of the settlement bore no resemblance to actual costs per ton and the settling PRPs were allocated a *de minimis* share of the response costs despite being responsible for the majority of the waste at the Site. 62 F.Supp.2d at 720-23; *see also Kelley v. Wagner*, 930 F.Supp. 293, 298-99 (E.D.Mich. 1996) (settlement containing complete contribution protection substantively unfair where settlement amount bore no resemblance to state's estimate of total response costs or allocation of fault to settling defendant).

At this Site, in recognition of the Diamond Defendants' 19 years operating the facility, they were allocated the majority of the financial burden of conducting the RI/FS. (*See* Proposed Consent Decree at ¶B.) Their 19 years operating the facility greatly exceeded the three years Sherwin-Williams owned the facility, much of which time was spent cleaning up the Site at substantial expense to Sherwin-Williams. There is no rational basis for allocating such limited liability to the Diamond Defendants. Notwithstanding their much greater time-in-possession at this Site than Sherwin-Williams, the Diamond Defendants are being relieved of all liability for

response costs at the Site and provided contribution protection for only $750,000, or less than 11% of the estimated response costs. Without the proposed consent decree, Sherwin-Williams would have a statutory right to seek contribution for response costs incurred at the Site under 42 U.S.C. §9613(f)(1); but the consent decree purports to bar any such recovery under 42 U.S.C. §9613(f)(2). This settlement and the (second) bankruptcy of Eagle-Picher potentially leave Sherwin-Williams responsible for the vast majority of the response costs despite its limited involvement at the Site. Put differently, the settlement would require the Diamond Defendants to pay less than $40,000 for each of their 19 years operating the facility while Sherwin-Williams would potentially be pursued for an average of $2.08 million for each of its three years owning the property and engaging in cleanup of Eagle-Picher's prior mess. The settlement amount bears no relation to a rational apportionment of liability and is impermissible in light of the inadequate consideration of the Diamond Defendants' ability to pay. In particular, there was no evidence collected and reviewed by the United States about Mr. Diamond's financial ability to pay his fair share which would permit a settlement with him for a *de minimis* amount. This alone makes the settlement void. In light of this failure to demonstrate a rational basis for allocation of such limited liability to the Diamond Defendants, and Mr. Diamond in particular, the proposed settlement is substantively unfair and should not be submitted to the court for approval.

2. Reasonableness

The proposed consent decree likewise fails the reasonableness requirement. Reasonableness depends on the efficaciousness of the decree in cleaning up the environment, the satisfactory compensation of the public for response costs, and consideration of the relative strength of the parties' litigating positions. *Cannon*, 899 F.2d at 89-90. None of these considerations weigh in favor of the Diamond consent decree. The $750,000 proposed

settlement compared with the total estimated response costs of $7 million does nothing to ensure that money will be available to pay for remediation, nor does it compensate the public in any meaningful way for response costs in light of the Diamond Defendants' long-term operation of the contaminated facility. Further, as the current owner of the Eagle Zinc Site, the Diamond Defendants are clearly jointly and severally liable for the full amount of the response costs under CERCLA section 107, as recognized by EPA's court filings. *See* 42 U.S.C. §9607(a)(1). Despite this strong litigating position, EPA has proposed the settlement with TLD and Mr. Diamond without reviewing any financial records from TLD for the 28 months prior to signing the consent decree (or any time subsequent to October 2005) or apparently ever reviewing financial records from Mr. Diamond, despite recognition of Mr. Diamond's personal liability for response costs and his years of taking large distributions from TLD. *See* Appendix A to Proposed Consent Decree. If EPA based its settlement amount on ability to pay, the failure to adequately investigate the Diamond Defendants' current ability to pay makes the determination capricious and unreasonable. As a whole, the reasonableness factors demonstrate that the proposed consent decree is unreasonable.

3. Consistency with CERCLA Statute

Finally, any proposed consent decree must be faithful to the policy concerns underlying CERCLA:

> First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

Cannon, 899 F.2d at 90-91. The present proposed consent decree accomplishes neither of these goals. Because of the small amount of the settlement, despite the Diamond Defendants'

significant role in causing the contamination, the settlement does nothing to promote a prompt and effective response to contamination at the Eagle Zinc Site. The settlement amount will pay for less than 11% of EPA's estimate of $7 million in response costs – not enough to make a dent in the total response cost – even though it relieves a primary PRP from all further liability for response costs and deprives the public and less culpable PRPs of an important source of compensation for response costs incurred. It also relieves the Diamond Defendants of the responsibility of paying their share of the response costs for the harmful conditions they created at the Site. Given the *de minimis* settlement amount for a PRP with substantial liability and fault and the failure to adequately consider ability to pay, neither of CERCLA's policy goals is satisfied by this proposed consent decree.

Because the proposed consent decree does not satisfy the requirements of fairness, reasonableness, or consistency with the purposes of CERCLA, the consent decree should not be submitted to the court for approval.

Respectfully submitted,

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